



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 18, 2005

Mr. Gary W. Smith  
City Clerk  
City of Baytown  
P.O. Box 424  
Baytown, Texas 77522-0424

OR2005-02361

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 220352.

The City of Baytown (the "city") received a request for "copies of all proposals your city received for the Comprehensive Compensation and Classification Study dated November 3, 2004" with the exception of the proposal submitted by the requestor. You claim that portions of the requested information are excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You also state that, pursuant to section 552.305 of the Government Code, you have notified the interested third parties, The Segal Company ("Segal") and Public Sector Personnel Consultants ("Public Sector"), of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). We have received correspondence from Public Sector. We have considered the exceptions you claim and reviewed the submitted information.

We first address your claim under section 552.104 of the Government Code with respect to the marked information in the submitted proposals. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The protections of section 552.104 serve two purposes. One purpose is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. Open

Records Decision No. 541 (1990). The other purpose is to protect the legitimate marketplace interests of a governmental body when acting as a competitor in the marketplace. Open Records Decision No. 593 (1991). In both instances, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. Open Records Decision No. 593 at 2. In this case, you inform us that the submitted information relates to an ongoing contracting process in which a contract has not yet been executed. Upon review of your arguments and the submitted information, we find you have sufficiently demonstrated the applicability of section 552.104 in this instance. Thus, we determine the city may withhold the marked portions of the submitted information from disclosure pursuant to section 552.104 of the Government Code.

You also indicate that release of the requested information may implicate the proprietary interests of Segal and Public Sector. Pursuant to section 552.305 of the Government Code, a governmental body that receives a request for information that implicates the proprietary interests of a third party is required to notify the third party of the request and of its opportunity to submit comments to this office explaining why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). An interested third party has ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B).

As of the date of this letter, this office has not received arguments from Segal indicating a proprietary interest in the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, we find the city may not withhold the information submitted by Segal on that basis.

Public Sector submitted a brief in which it that portions of its proposal are excepted from disclosure pursuant to section 552.110 of the Government Code.<sup>1</sup> Section 552.110 protects:

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<sup>1</sup>We note that Public Sector argues that section 552.104 of the Government Code excepts the requested information from disclosure. Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). Therefore, we do not address Public Sector's claim under section 552.104.

(1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See Gov't Code § 552.110(a), (b). Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); see also *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Based on our review of Public Sector's arguments and the remaining information at issue, we find that Public Sector has adequately demonstrated that portions of the remaining submitted information constitute commercial and financial information, the release of which would cause Public Sector substantial competitive harm for purposes of section 552.110(b). Accordingly, we determine that the city must withhold the information that we have marked pursuant to section 552.110(b) of the Government Code.

We note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. See Open Records Decision No. 550 (1990).

In summary, the city may withhold the information that it has marked under section 552.104 of the Government Code. In addition, it must also withhold the information that we have marked under section 552.110(b) of the Government Code. The remaining information must be released to the requestor. Information protected by copyright must be released in compliance with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "L. Joseph James".

L. Joseph James  
Assistant Attorney General  
Open Records Division

LJJ/seg

Ref: ID# 220635

Enc. Submitted documents

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